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Opinion of the Court of Appeals

For the Ninth Circuit A-1

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO._____

UNITED STATES OF AMERICA

Plaintiff,

vs.

JESUS ALVAREZ FRANCO

Defendant and Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit has not been officially reported. It is re-printed in the appendix. The District Court did not render an opinion.

JURISDICTION

The judgment of the Court of Appeals was filed and entered on May 16, 1973. A stay of mandate was issued by the said Court on May 29, 1973 pending the filing of this petition. There has been no order respecting a rehearing nor was there any order respecting an extension within which to file a petition for a writ of certiorari. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Whether a District Court may consider as a factor in imposing sentence upon a criminal defendant the possibility that such defendant committed perjury during the course of his trial.

STATEMENT OF THE CASE

On August 17, 1971, after a trial before the District Court for the Eastern District of California sitting without a jury, defendant was found guilty of making false statements

in connection with the purchase of a handgun and of wilfully misrepresenting himself to be an American citizen, in violation of 18 U.S.C. 922(a)(6) and 18 U.S.C. 911 respectively.

Judgment was entered by the District Court on August 31, 1971. The Court sentenced defendant to the maximum terms of imprisonment, suspended all but six months of the prison terms, ordered defendant placed on probation for five years, and as a condition of probation, ordered that defendant, an alien, be deported to his native country of Mexico, not to return without the express written permission of the District Court and the U.S. Immigration authorities.

Defendant appealed from that judgment to the United States Court of Appeals for the Ninth Circuit which on July 17, 1972, affirmed defendant's conviction. However, the Court of Appeals remanded the proceedings to the District Court for resentencing on the

ground that the District Court's sentence of deportation was not proper. Defendant's petition for a writ of certiorari was subsequently denied by the United States Supreme Court.

Thereafter, in the District Court defendant filed an affidavit of bias and prejudice, pursuant to 28 U.S.C. 144, against the Honorable Sherill Halbert, the judge who had tried and sentenced defendant. Defendant requested that the judge disqualify himself from further proceedings involving defendant.

On December 18, 1972, Judge Halbert denied the affidavit and request. He imposed upon defendant the same sentence he had previously, with the exception of the order for defendant's deportation. The Court of Appeals affirmed on May 16, 1973.

REASONS FOR GRANTING THE WRIT

The writ should be granted in order to resolve a conflict in opinion upon the issue

between the Court of Appeals for the Ninth Circuit and the Court of Appeals for the District of Columbia Circuit.

In Scott v. U.S., 419 F.2d 264 (D.C. Cir. 1969) the Court of Appeals for the District of Columbia Circuit concluded that a trial judge's belief that a defendant had committed perjury while testifying in his own defense could not properly be considered in determining the defendant's sentence.

The Court's reasoning was stated in Part III of its opinion (419 F.2d 268, 269):

> "[5] Since a resentencing will be necessary, two other considerations the trial judge relied upon in sentencing the appellant require comment. The first problem arises from the judge's repeated statements that he believed the appellant had committed perjury on the witness stand in denying that he had participated in the robbery. There are two arguments why this belief would properly influence the choice of a sentence: (1) that additional punishment should be imposed for the independent substantive offense of perjury; (2) that the commission of perjury reflected adversely upon the appellant's

"prospects for rehabilitation, and therefore justified a lengthier sentence for the crime of robbery.

"The first argument deserves emphatic rejection. The Government could if it wishes prosecute the appellant for perjury. In such a proceeding, the appellant would have all the protection of a criminal trial. If the trial judge in fact imposed additional punishment upon the appellant for the supposed commission of perjury, he plainly denied the appellant the trial upon that offense to which Scott was entitled.

"As for the second argument, the peculiar pressures placed upon a defendant threatened with jail and the stigma of conviction make his willingness to deny the crime an unpromising test of his prospects for rehabilitation if guilty. It is indeed unlikely that many men who commit serious offenses would balk on principle from lying in their own defense. The guilty man may quite sincerely repent his crime but yet, driven by the urge to remain free, may protest his innocence in a court of law. This realization, indeed, unquestionably accounts for the extreme infrequency with which convicted criminals are in fact prosecuted for perjury committed at their trials.

"The Government argues that the appellant 'has no constitutional right to lie.' The beguiling simplicity of this proposition misphrases the question. Of course, a defendant

"has no constitutional right to lie, however much we may sympathize with his too human temptation. But the defendant does have a right to testify in his own defense. In doing so, he risks the jury's disbelief. If he in fact fails to convince the jurors, conviction and punishment will follow. If the Government for whatever reason concludes that prosecution for perjury is appropriate, he risks punishment for that as well. To allow the trial judge to impose still further punishment because he too disbelieves the defendant would needlessly discourage the accused from testifying in his own behalf."

At the conclusion of this petitioner's trial, the trial judge declared from the bench: (Reporter's Transcript pp. 98, 99)

"THE COURT: I listened with great care to the evidence in this case, and I'm convinced that the defendant is a fraud of the worst character. That he's neither been frank with the Court nor truthful. I'm sure that he is guilty of both of the crimes that are set forth in the indictment, and I so find him. I'm not at all certain that he hasn't committed perjury in this case, and I suggest to the government that it is a case that is not worthy of examination by the grand jury to determine whether or not this defendant has committed perjury. Frankly, I'm outraged by people who commit perjury. These people can come into court and tell

"a complete untruth, an honest man hasn't got a chance. I believe that the defendant has been leading a life of deception ever since he entered the United States back in 1940, some thirty years ago. It would be hard for me to believe that he doesn't know English at all after being here thirty years. And the thing that convinces me he is a liar and a fraud, is the fact that he himself testified that Mr. Cassidy told him to come back in five days and he could get the gun. He now says he doesn't understand that statement when I say it to him. He himself testified that Mr. Cassidy told him that the hundred dollars was the first down payment and that he would have to pay the balance later. He now tells me that he doesn't understand what I'm saying when I say that to him. His thought capacity might deteriorate in one direction, but it would not improve, I'm sure."

The conclusion is inescapable in the instant case that the trial judge sentenced defendant to a prison term because of his belief that defendant committed perjury. The judge said as much from the bench and was uninfluenced by the other factors tending to ameliorate the necessity of a prison sentence. That is, defendant's age, the fact that he was the sole support of a wife and four minor

children, the fact that he voluntarily returned the gun he bought a week later, that he had never used the gun or attempted to use it, and that the felony for which he had been convicted was that of helping two Mexican aliens across the border some 17 years earlier and involved no violence.

Given the conflict in the circuits that the decision below brings about and the importance that resolution of such conflict would have upon the administration of criminal justice, the writ ought to be granted.

Dated at San Francisco, California, June 15, 1973.

DONALD L. UNGAR
Attorney for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. JESUS ALVAREZ-FRANCO, *Defendant-Appellant.*	No. 73-1341

[May 16, 1973]

Appeal from the United States District Court
for the Eastern District of California

Before: CHAMBERS and WALLACE, Circuit Judges, and EAST,* District Judge

MEMORANDUM

This is the second time Alvarez-Franco has been before us. The first time, we affirmed his conviction and remanded for resentencing. *United States v. Alvarez-Franco*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 980 (1972). The impermissible part of the sentence was then deleted.

Upon remand, Alvarez-Franco requested the district judge disqualify himself. We need not reach the question. The request was not timely. *See* 28 U.S.C. § 144.

Alvarez-Franco also challenges the sentence, arguing that the judge may have considered that he lied—which, of course, he denies. We do not review sentences. Further, when imposing a sentence, it is not impermissible for a judge to consider his prior observation of a defendant's testifying in court.

AFFIRMED.

*Honorable William G. East, Senior United States District Judge, Eugene, Oregon, sitting by designation.

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1723

JESUS ALVAREZ-FRANCO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that when the district judge imposed sentence here, he improperly relied on the fact that petitioner had committed perjury during trial.

Following a jury-waived trial in the United States District Court for the Eastern District of California, petitioner was convicted on both counts of an indictment which charged him with having knowingly made false statements in connection with the purchase of a handgun, in violation of 18 U.S.C. 911 and 922(a)(6). He was sentenced to consecutive maximum prison terms on each count (five years and three years); all but six months of the entire sentence was suspended, and petitioner was placed on probation on the condition that he be deported. The court of appeals affirmed the conviction *per curiam*, but found the sentence improper insofar as it related to deportation and remanded the case for resentencing. This Court denied certiorari (409 U.S. 980).

On December 18, 1972, prior to resentencing, the district judge, who had presided over the trial, denied petitioner's affidavit of bias and prejudice, under 28 U.S.C. 144, and imposed the same sentence as originally imposed, with the exception of the deportation order. The court of appeals affirmed on May 16, 1973 (Pet. App.). The petition for a writ of certiorari was not filed until June 20, 1973, and is out of time under Rule 22(2) of the Rules of this Court. There is in any event no reason to grant the writ.

Petitioner's defense at trial had been that his false statements were not knowingly made, because he did not understand the questions asked by the dealer to obtain the information necessary to complete the official firearm application forms. In an effort to elicit the extent of petitioner's command and understanding of the English language, the trial judge in this non-jury case engaged in a brief colloquy with petitioner during his testimony. Partly on the basis of this colloquy, the judge found him guilty, indicating disbelief in petitioner's statements that he did not comprehend English.

Petitioner's sole claim here is that the district court judge improperly considered petitioner's veracity during trial to determine the sentence imposed. This claim is unsupported by the record. The district court did not state at the time of sentencing that he was in fact taking petitioner's perjurious conduct into consideration. The only statement cited by petitioner is the district court's finding—in announcing his verdict—that petitioner had "neither been frank with the Court nor truthful," and that petitioner was "guilty of both of the crimes that are set forth in the indictment" (Pet. 7). These were clearly proper findings in a non-jury case. See Fed.R.Crim.P., Rule 23(c). Moreover, the trial judge's statements at that time, that he was "outraged by people who commit per-

jury," but was "not at all certain that * * * [petitioner] hasn't committed perjury in this case" and "that it is a case that is *not* worthy of examination by the grand jury to determine whether or not this defendant has committed perjury" (Pet. 7), hardly establish that the district judge, in imposing what amounts to a six month sentence, considered petitioner's false testimony during trial.

This case is, therefore, distinguishable from *Scott* v. *United States*, 419 F. 2d 264 (C.A.D.C.), upon which petitioner relies. In *Scott* the court of appeals held that resentencing was necessary where the trial judge indicated at sentencing that he was "in fact impos[ing] additional punishment upon the appellant for the supposed commission of perjury" (*id.* at 269) instead of requiring the government to prosecute for perjury. Here, the district judge made no comparable statement. Compare *United States* v. *Isaac*, 449 F. 2d 1040, 1044 (C.A.D.C.) (dissenting opinion of Bazelon, J.).[1] While we believe, contrary to the holding in *Scott*, that the sentencing judge could properly have considered petitioner's patently false testimony at trial, this clearly is not the case in which to resolve any alleged conflict among the courts of appeals.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1973.

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[1]In *United States* v. *Isaac*, *supra*, the Court of Appeals for the District of Columbia Circuit, over the dissent of Chief Judge Bazelon, who wrote the opinion in *Scott*, declined to extend the *Scott* holding to a factual setting not unlike the instant case.

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